No. 12478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

An Information was filed in the United States District Court, District of Nebraska, Omaha Division, on March 10, 1948, charging appellant under Section 408 of Title 18, United States Code (1946 Ed.) [TR[1] 10]. The case was transferred to the District Court of the Southern District of California pursuant to Rule 20 of the Federal Rules of Criminal Procedure [TR 11-18], and judgment was entered on April 20, 1948 [TR 29-30]. Notice of Appeal was filed on February 2, 1950 [TR 40]. This Court has jurisdiction under Section 2255 of Title 28 of the United States Code.

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[1]References preceded by the letters TR are to the typewritten "Transcript of Record"; and those references preceded by the letters AB are to Appellant's Opening Brief.

Statement of the Case.

On March 10, 1948, an Information was filed against the appellant in the United States District Court, District of Nebraska, Omaha Division. The Information, which was in one count, charged the appellant with having transported and with having caused to be transported in interstate commerce, a motor vehicle, knowing it to have been stolen [TR 10]. The transportation was alleged to have been from Omaha, Nebraska to Fayetteville, Arkansas. On the same day, pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure, there was filed in the same Court, by the appellant, a waiver of prosecution by indictment [TR 9].

On March 29, 1948, the appellant filed his consent to transfer of case for plea and sentence in the United States District Court, Southern District of California, as required under Rule 20 of the Federal Rules of Criminal Procedure [TR 11]; and following his plea of guilty in that Court on April 5, 1948 [TR 14-18], he was sentenced to a term of imprisonment of one year [TR 25, lines 18-22]. At all times from the date of his first court appearance to judgment the appellant was represented by counsel [TR 3, 4, 5, 6, 9, 13, 14, 15].

The appellant, on January 9, 1950, filed in the United States District Court, Southern District of California, a motion to vacate judgment and sentence, pursuant to the provisions of Section 2255 of Title 28, United States Code [TR 33-37]. Appellant based his motion on an alleged misconception of the law at the time he pleaded

guilty, claiming in his Statement of the Case [TR 34, lines 13-19], that "It appears in the information" filed against the appellant that title of the subject motor vehicle was acquired by the appellant by payment of a worthless check for same; and that the word "stolen" as it appears in Section 408 of Title 18, United States Code does not apply when the defendant has through fraud acquired title to the automobile which he transported interstate [TR 34-35, Petitioner's Argument]. On January 23, 1950, the motion of appellant came on to be heard before Judge Peirson Hall and on hearing of the motion the Court entered an order denying the same. At the time of filing the motion to vacate judgment and sentence, the appellant also filed a petition for a writ of *habeas corpus ad testificandum* to produce himself at the hearing on his motion [TR 38]. The petition was denied at the time of the hearing.

On February 2, 1950, the appellant filed a notice of appeal in the United States District Court, Southern District of California.

The Transcript of Record contains certain material which is alien to this cause. The Record makes occasional reference to Case Number 19821, a case against the appellant which originated in this District and which was disposed of at the same time as was the case which is the subject of the appeal [TR 25, lines 8-22, showing sentence imposed in Number 19821, and sentence imposed in the case which is the subject of this appeal, Number 19946].

Statutes and Regulations Involved.

(A) The Penal Statute.

Section 408 of Title 18, United States Code (1946 Edition), known also as the Dyer Act:[2]

> "Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5000, or by imprisonment or not more than five years, or both."

(B) The statute under which the appellant filed his motion to vacate judgment and sentence in the District Court:

Section 2255 of Title 28, United States Code (1946 Edition):[2]

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the . . . laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or other-

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[2]Immaterial portions of the Statute have been omitted.

wise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus*."

(C) The rule under which the case was transferred from the District of Nebraska to the Southern District of California for plea and sentence:

Rule 20 of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code:

"A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district. If after the proceeding has been trans-

> ferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made."

(D) The rule which appellant urges should have been applied by the Court at the hearing of appellant's motion (AB 30).

Rule 32(d) of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code:

> "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Summary of Argument.

The argument of the Government is divided into three parts. (1) The first part will deal with the contention of the appellant that sentence was imposed by the Court in violation of the laws of the United States and was not authorized by law. (2) The second part discusses whether there was error or abuse of discretion by the Court in the manner in which the hearing on appellant's motion under Section 2255 was conducted. (3) The third part is concerned with the argument of appellant regarding the validity of Rule 20 of the Federal Rules of Criminal Procedure. (4) The last part answers appellant's contention that the Court should have granted the withdrawal of appellant's plea of guilty under Rule 32(d) of the Federal Rules of Criminal Procedure.

ARGUMENT.

I.

The Sentence Imposed by the Court Was Not in Violation of the Laws of the United States and Was Authorized by Law.

At the time of sentence of the appellant, the Court was acquainted with appellant's activities in connection with the offense with which he was charged [TR 23, lines 14-18]; and at the time the Court made the order denying the motion of the appellant under Section 2255 of Title 28, there was before the Court the appellant's argument and statement of the case which restate facts already known to the Court [TR 33-37]. The appellant's argument cited the authority on which he now principally relies to show that the Court imposed sentence in violation of the laws of the United States; namely, *Hite v. United States*, 165 F. 2d 973 (10th Cir., 1948) [TR 35, lines 17, 18]. It must be assumed that the Court rejected this authority in denying appellant's motion, unless other cause appear. The appellant argues that since he obtained possession and *title* to the automobile by false pretenses (giving of a bad check), rather than obtaining possession by larceny, the car was not "stolen" in the true meaning of that word as used in Section 408 of Title 18. This is the holding of the *Hite* case, where it was determined that the word "stolen" as used in the Section meant *obtained by larceny*. It is this principle that the Court rejected in denying appellant's motion. But set out below is authority which sheds doubt on the correctness of the ruling in the *Hite* case.

In the case of *Crabb v. Zerbst,* 99 F. 2d 592, the Court had occasion to define the word "steal" as it appeared in Title 18, United States Code, Section 100.[3] In answering the defendant's contention that "to steal" was "to commit larceny" the Court said:

> " 'Steal' and 'purloin' are not synonymous, though used in dictionaries in defining larceny and in defining each other; and 'steal,' *having no common law definition* to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to 'purloin.' " (Emphasis added.)

In *United States v. Handler,* 142 F. 2d 351, the defendant again insisted that the word "steal" was synonymous with the act of common law larceny. The statute under consideration was the National Stolen Property Law, Title 18, United States Code, Section 415,[4] and the controversy

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[3]§100 (Criminal Code, Section 47). Embezzling public moneys or other property. Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or other valuable thing whatever, or the moneys, goods, chattels * * *.

[4]Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin * * *.

had to do with the meaning of the phrase "with intent to steal and purloin." At page 353 the Court said:

> "But we cannot accept the appellant's argument that a taking with intent to steal is synonymous with technical larceny. In various federal statutes the word 'stolen' or 'steal' has been given a meaning broader than larceny at common law. See United States v. Trosper, 127 Fed. 426, 477, 'steal' from the mail; United States v. Adcock, 49 Fed. Supp. 351, 353, interstate transportation of 'stolen' automobile. * * *."

The *Adcock* case, cited immediately above, is an instance where the Court held that the word "stolen," as used in Section 408, could mean embezzlement. The owner loaned his automobile to a former employee to go to a nearby town. The employee made his planned journey and then decided to keep the automobile. He subsequently drove the car over several state lines and was finally indicted for violation of Section 408. Under no theory could the employee be said to have committed larceny by the taking, for the machine was in his sole possession rightfully at the time of his criminal conversion of it. It was an embezzlement of the automobile. The Court in defining the word "stolen" as it appeared in the statute said:

> "I am of the opinion that the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in the well known and accepted meaning of taking the personal property of another for one's own use without right or law, and that

> such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it."

It would appear from these cases that the words "stolen" and "steal" are not too limited in their meaning, despite the holding in the *Hite* case. The words are used to apply to all common law criminal offenses against property. It is true that the phrase "to steal, take and carry away" was a frequently used definition of larceny at common law; but it does not follow that the word apart from the phrase carries the same meaning as the phrase.

There appears to be little reason for limiting the meaning of the word "stolen" as was attempted in the *Hite* case. For those who limit the meaning on the premise that it had a legal meaning at common law, the answer must be that there is but little authority for the premise. The word has a broader connotation than larceny alone. The Government, therefore, takes the position that the Court, in denying the petition of the appellant, placed a construction on the word "stolen," which is both reasonable under the law, and much to be desired. It is submitted that this Court has the privilege of adopting the construction of the District Court and should adopt that construction in order to give the Statute the full effect and coverage which Congress must have intended.

II.

There Was Neither Error nor Abuse of Discretion by the Court in the Manner in Which the Hearing on Appellant's Motion Under Section 2255 of Title 28 Was Conducted.

Section 2255 of Title 28, United States Code, specifies that on a motion made pursuant to the Section, "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." The discretion permitted the Court is not limited. The proper exercise of that discretion is any exercise of it. These considerations dispose of appellant's fifth Specification of Errors (AB 7).

The appellant's first, second and third Specification of Errors (AB 7) are based upon the assumption that the Court failed to conduct the hearing in strict conformity with Section 2255. An examination of the minutes of the hearing [TR 39] would indicate that the hearing was proper. This appears from the language used: "For hearing on motion of defendant to vacate judgment and sentence *pursuant to provisions of Title 28, Sec. 2255 U. S. C. . . .*" Emphasis added.)

The appellant's fourth Specification of Error is sufficiently answered in the first part of the Argument.

III.

Rule 20 of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code, Is Valid Under the Constitution of the United States, and the District Court Acting Under Its Provisions Had Jurisdiction of the Appellant.

The appellant asserts the invalidity of Rule 20 of the Federal Rules of Criminal Procedure, citing *United States v. Bink,* 74 Fed. Supp. 603, and other cases which support it. In the *Bink* case, in an exhaustive discussion of the Rule, Judge Fee held that the Constitution[5] forbade indictment, trial or judgment in a criminal case in any state or district except where the crime was committed, and that the consent of the parties could have no effect to take jurisdiction from one district and confer it on another. In his attack on Rule 20, the appellant relies chiefly on the *Bink* case.

Those portions of the Constitution relied upon by the appellant as definitive of the limits of jurisdiction of Federal Courts in criminal matters do not support appellant's contention that they forbid the transfer of a criminal case for the purpose of a plea of guilty or *nolo contendere,* and judgment. The Constitutional provisions speak only of *trial* of a criminal matter in other than the state of its commission or the district of its commission. There is no

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[5]Article III, Section 2, Clause 3, provides: "The trial of all crimes * * * shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed * * *."

Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

where a proscription of transfer for the purposes set out in Rule 20.

But assuming that the language in the Constitutional provisions implies all criminal proceedings from indictment to judgment, the Government contends that the language was calculated to guarantee to the accused a right rather than to establish jurisdiction only, and that the right to prosecution in the district or state in which the crime was committed may be waived by the accused. Certain it is that the provisions for trial by jury which appear together with the provisions for place of trial, are deemed to be a right of the accused and hence may be waived. In *Patton v. United States,* 281 U. S. 276, the appellant argued that the Constitution did not confer a right or privilege of trial by jury, but made it mandatory; but the Court, after discussing the effect of the VI Amendment, stated at page 298:

> "Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement."

And in *Hagner v. United States,* 54 F. 2d 446 (affirmed, 285 U. S. 427), and *Mahaffey v. Hudspeth,* 128 F. 2d 940 (certiorari denied, 317 U. S. 666), it was expressly held that these portions of the Constitution deal with venue rather than jurisdiction and that the accused may waive the jurisdiction of the court of trial.

It appears that the three cases cited and discussed above overrule *Ventimiglia v. Aderhold,* 51 F. 2d 308, which was decided shortly after the *Patton* case but before the *Hagner*

and *Mahaffey* cases. The *Ventimiglia* case, relied upon by the appellant, construed Article III, Section 2, Clause 3, as establishing jurisdiction only, which is a construction clearly at variance with that of the Supreme Court in the *Patton* case.

Rule 20 has operated as a most useful device, generally meeting with favor wherever employed. It has been adopted by the Supreme Court of the United States and has been a part of our adjective law for almost four years. Its almost universal acceptance for this period of time attests to its effectiveness and tends to create by that fact alone a strong presumption of its validity. For those who would object that it gives a defendant an opportunity to "shop around," we remind that the election by the defendant is possible only on the concurrence of the United States Attorney at the place of arrest and at the place of the crime.

IV.

Failure of the Court to Invoke Rule 32(d) of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code, to Permit the Appellant to Change His Plea From Guilty to Not Guilty When the Appellant Did Not File a Motion Pursuant to the Rule, Was Not Error.

The appellant failed to move the court under the provisions of Rule 32(d). This remedy is still available to him. It is a novel theory that it may be error for a Court to fail to act on a motion not made or filed. But it is too early for the appellant to complain in this regard, for he may still resort to Rule 32(d).

V.

Conclusion.

The appellant is in error in his conclusions of law. The word "stolen" as it appears in Title 18, United States Code, Section 408, is descriptive of vehicles taken by larceny, embezzlement, or by false pretenses, in the common law meaning of these terms. The Court in ruling on appellant's motion with the facts before it, did not commit error in denying the appellant's motion.

The appellant was given a proper hearing under the provisions of Section 2255 of Title 28, United States Code. The facts were before the Court at the time of the hearing as were also the appellant's authorities on the law. The minutes of the motion indicate a compliance with the provisions of Section 2255.

The Court had jurisdiction of the appellant at the time of plea and sentence, by reason of the operation of Rule 20 of the Federal Rules of Criminal Procedure. The Rule is concerned with a matter of venue rather than jurisdiction and is not in violation of pertinent sections of the Constitution.

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